

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Petition of the Safety and Enforcement
Division to Adopt, Amend, or Repeal
General Order 95 Pursuant to Pub. Util.
Code Section 1708.5

Order Instituting Rulemaking to Consider
Specified Amendments to Rule 18 of
General Order 95.

P.16-05-004
(Filed May 9, 2016)

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PUBLIC UTILITIES COMMISSION
NOVEMBER XX, 2016
SAN FRANCISCO, CALIFORNIA
RULEMAKING 16-11-XXX

**SAFETY AND ENFORCEMENT DIVISION'S
OPENING COMMENTS ON THE PROPOSED DECISION REGARDING
PETITION 16-05-004 AND ORDER INSTITUTING RULEMAKING TO
CONSIDER SPECIFIED AMENDMENTS TO RULE 18 OF GENERAL ORDER 95**

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I. INTRODUCTION

Pursuant to Rule 14.3 of the Commission’s Rules of Practice and Procedure, the Safety and Enforcement Division (SED) submits its opening comments on the Proposed Decision (PD) of Commissioner Picker issued on October 6, 2016. SED appreciates that the PD finds that “SED has made a reasonable case that General Order 95, Rule 18 is not conducive to safety and reliability to the extent the Rule allows utilities to defer or forgo the remediation of overhead facilities that pose a risk to safety and/or reliability.”¹

While the PD’s intent is to address Rule 18’s flaws, its proposed amendments to Rule 18 do not resolve SED’s main concerns with the rule. Replacement of the term “nonconformance” and removal of the priority levels and their associated time periods are good steps, but it appears that the amended Rule 18 would allow General Order (GO) 95 violations to exist for indeterminate periods of time that are within the control of the

¹ PD, Finding of Fact (FOF) Number (No.) 2.

utility or Communication Infrastructure Provider (CIP). This would continue to create enforcement problems for SED, and would undermine the citation authority granted to SED. In Decision (D.) 16-09-055, the Commission provided guidance regarding factors that Staff should weigh in deciding whether to issue a citation and, if so, in determining the amount of the penalty. If Rule 18 is maintained, there needs to be a clear message that all violations of GO 95's safety requirements are subject to potential enforcement actions, regardless of whether the utility has plans for corrective action.

SED submits that the Commission should expand the issues listed in the Preliminary Scoping Memo within the PD. The Commission should give SED the opportunity to submit evidence on the flaws of Rule 18 for the Commission to determine whether a repeal is necessary to remedy any risk to safety and reliability that it creates for overhead facilities. SED continues to advocate deletion of Rule 18, as explained in our petition that led to Petition (P.) 16-05-004. SED respectfully requests that the Commission modify the Preliminary Scoping Memo to include consideration of repealing Rule 18. Further, if the Commission decides to consider modifications or amendments to Rule 18, such consideration should be broader than the four issues recommended by the PD.² Broadening the scope of the rulemaking will allow parties to develop a full record on Rule 18, including whether individual portions of Rule 18 could be modified productively and, based on that record, whether a modified Rule 18 could have sufficient value to warrant its retention in a modified form.

II. DISCUSSION AND RECOMMENDATIONS

A. The Scope of The New Rulemaking Should Include Consideration of Whether the Commission should Repeal Rule 18

In its Petition, SED requests the Commission to repeal Rule 18 in its entirety. The PD proposes to commence a rulemaking based on SED's Petition. The PD agrees that there are flaws in Rule 18 that require modifications, but does not propose that the new

² PD, p. 19, section 7.1.1.

rulemaking consider repeal of Rule 18. However, the rulemaking should provide SED and other parties the opportunity to submit facts in evidence for the Commission to consider in deciding whether it should repeal Rule 18. The rulemaking could also consider, for example, whether the definitions of “Southern California” and “Extreme and Very High Fire Threat Zones” should be moved elsewhere in GO 95 if Rule 18 is repealed.³

It is important to note that by including this issue, the Commission will not bind itself to repealing Rule 18. Instead, the Commission can determine whether repealing Rule 18 is reasonable based on record evidence. The rulemaking is the only venue for the Commission to receive evidence to make its determination on the reasonableness of SED's position to repeal Rule 18. SED is asking that the Order Instituting Rulemaking (OIR) list as an issue SED's main position in the Petition.

With an expanded scope, SED can submit record evidence as to how Rule 18 creates a contradiction to the safety provisions of GO 95 and the Public Utilities Code. The current Rule 18, and the modified Rule 18 in the PD, not only permit dangerous conditions by allowing violations to exist, they also hinder SED's ability to enforce the rules in GO 95. It is prudent for utilities and Communication Infrastructure Providers (CIPs) to adopt and implement programs to prevent violations. Rule 18 presents utilities and CIPs with excuses not to adopt such programs.

SED will not restate the content of its Petition regarding repealing Rule 18 in these opening comments. However, SED asks that the Commission provide the opportunity to submit record evidence to substantiate the Petition. The rulemaking is the procedural mechanism where SED can submit evidence to do so.

³ The PD concludes that these definitions should not be repealed (PD, p. 14, Section 5).

B. If the Rulemaking Considers Amending Rule 18, the Commission Should Expand the Preliminary Scope to Allow Broader Consideration of Possible Amendments

The PD significantly limits the scope of amendments to Rule 18 to be considered in the new rulemaking. The Commission should expand the scope to ask what modifications are necessary to Rule 18 that would improve its effectiveness in making overhead facilities safer. The PD includes the following four specific amendments to Rule 18 in the Preliminary Scoping Memo:

1. Eliminate the provisions in Rule 18 that allow utilities to defer or forego the remediation of overhead facilities that pose a risk to safety and/or reliability;
2. Replace the term "nonconformance" in Rule 18 with the term "violation";
3. Correction of non-substantive typographic errors in Rule 18; and
4. Ancillary amendments to Rule 18, other rules in GO 95, and other general orders, as appropriate, to reflect the previous amendments to Rule 18.⁴

SED does not object to these being part of the issues for the Commission to consider. Rather, SED submits that the PD should include a more expansive scope that would provide SED and other parties an opportunity to suggest or agree on other amendments to Rule 18 that are likely to enhance the safety and reliability of overhead facilities.

The Commission has recently held that a broad scope in a rulemaking is justified to develop a sufficient record.⁵ In fact, in Decision (D.) 15-09-022 in R.14-08-013, the Commission realized that the scope of the proceeding should be broader than originally anticipated in that proceeding's OIR.⁶ The OIR should allow consideration of amendments that the preliminary scoping memo in the PD does not include. In the

⁴ PD, Ordering Paragraph (OP) No. 1 (page 29); *See also* Appendix B of the PD.

⁵ Rulemaking (R.) 16-02-007, 2016 Cal. PUC LEXIS 85, at *21 (Cal. PUC 2016):

⁶ R.14-10-003, 2015 Cal. PUC LEXIS 565 at *2; 324 P.U.R.4th 129 (September 17, 2015)

sections below, SED provides examples of why the Commission should expand the scope of the new rulemaking.

If the Commission does not limit the rulemaking to consideration of repeal of Rule 18, but instead allows consideration of amendments to the Rule, the scope of the amendments that may be considered should be broad, to allow consideration of more options for amendments. Below are some examples of issues that the Commission could consider in the new rulemaking. SED can only submit evidence to their validity if the Commission broadens the scope of issues in the scoping memo.

1. Whether Rule 18 should specify that it does not relieve companies from any requirements elsewhere in GO 95

One modification to Rule 18 specified in the PD would replace the term “nonconformance” with the term “violation.”⁷ The PD also proposes removal of the priority levels in Rule 18.A, along with the associated time-periods allowed for correcting the “violations.”⁸ The PD's amendments also would allow and indeed direct utilities to prioritize violations based upon the list of factors specified in Rule 18.A. While the PD's intent is to address Rule 18's flaws, these suggested amendments do not resolve SED's main concerns with Rule 18 and its dangerous impact on safety. Instead, it appears that the amended Rule 18 would allow violations to exist for indeterminate periods of time, with the timing of any corrective action only within the control of the utility or CIP. This would continue to undermine the rest of GO 95 and would continue to create enforcement problems for SED.

The rules in GO 95 were established as minimum requirements to protect the public from safety and reliability hazards.² That protection exists only when the requirements are met. As soon as a CIP or utility violates a safety rule, the public is

⁷ PD, p. 28.

⁸ *Id* at 27.

² R.08-11-005 2008 Cal. PUC LEXIS 444, *3-*4 (Cal. PUC 2008)

exposed to the hazard that the rule is intended to protect against. Violations of GO 95 safety rules can have major consequences such as fatalities, injuries, fires, outages, and property damage.

For example, a vehicle that is tall enough can strike a sagging conductor over a highway. A dry branch contacting with a high voltage conductor may start a fire on the next windy day. A pole that is not strong enough may break the next time the wind blows. An exposed cable on the side of a pole may cause an electrocution the next time children are playing in the area. A transformer that is overloaded may explode on the next hot day. No one can predict when such incidents will occur. If the Commission allows violations, it allows dangerous conditions to exist.

The requirements in GO 95 were always intended to be met at all times in order to maintain a safe and reliable system, until Rule 18 changed that. Rule 18 introduced the concept of allowable violations, and the PD's proposed modifications do not eliminate that defect.

The CPUC's Safety Policy Statement¹⁰ describes that the CPUC Overarching Safety Mission is:

...to assure that the regulated utilities we depend on for critical services are as safe and resilient as they can possibly be. [footnote omitted.] The CPUC not only will assure compliance with safety laws and regulations, but also challenge itself and the utilities to excellence. **Ultimately we are striving to achieve a goal of zero accidents and injuries across all the utilities and businesses we regulate, and within our own workplace.** [footnote omitted, emphasis in original.]

The Commission cannot achieve the Safety Mission if Commission rules allow known violations to continue. Rule 18, both as it currently exists and with the modifications in the PD, conflicts with this CPUC safety policy because it allows

¹⁰ The Safety Policy Statement is available through a link at <http://www.cpuc.ca.gov/general.aspx?id=7772>

violations to continue to exist, thus allowing dangerous conditions and exposing the public to these dangerous conditions.

In addition, permission in Rule 18 for continued GO 95 violations reduces incentives for utilities and CIPs to implement preventive measures to ensure that their facilities stay in compliance with GO 95. Instead, Rule 18 seems to sanction a “run to failure” approach, if there are no consequences for lack of preventive maintenance.

GO 128, Rule 12.2, states:

“Systems **shall** be maintained in such condition as to secure safety to workmen and the public in general. Systems and portions thereof constructed, reconstructed, or replaced on or after the effective date of these rules shall be kept in conformity with the requirement of these rules.”(emphasis added) GO 128, Rule 17.2, states: “Systems **shall** be inspected by the operator frequently and thoroughly for the purpose of insuring that they are in good condition and in conformance with all applicable requirements of these rules.”(emphasis added)

It is clear that GO 128 not only prohibits violations to exist, but it also requires utilities and CIPs to develop maintenance programs to correct problems before they become violations to ensure that their facilities are in compliance with GO 128 at all times. GO 112-F, Reference Title 49 CFR, Part 192, § 192.703(a) states: “*No person may operate a segment of pipeline, unless it is maintained in accordance with this subpart*”; GO 112-F, Reference Title 49 CFR, Part 192, § 192.603(a) states: “*No person may operate a segment of pipeline unless it is operated in accordance with this subpart.*” It is clear that GO 128 and GO 112-F require utilities to implement programs to prevent violations from occurring, and they do not tolerate the existence of a violation. GO 95 should be consistent with such safety rules.

GO 165 establishes requirements for electric utilities regarding inspections of electric distribution and transmission facilities “in order to ensure safe and high-quality electric service.”¹¹ GO 165 states as follows:

¹¹ GO 165, Section I.

The requirements of this order are in addition to the requirements imposed upon utilities under General Orders 95 and 128 to maintain a safe and reliable electric system. Nothing in this General Order relieves any utility from any requirements or obligations that it has under General Orders 95 and 128.¹²

If Rule 18 is intended to reinforce that GO 95 rules must be followed and that utilities and CIPs must take action to ensure compliance with GO 95, it should say so.

2. Use of the term “nonconformance”

SED's Petition describes how insertion of the term “nonconformance” came to be, and the problems that it has caused. The CIPs’ and utilities’ interpretations of the term “nonconformance” in Rule 18 contradict the Commission's holding in D.04-04-065 that there are no differences between a nonconformance and a violation.¹³ The PD proposes to replace the term “nonconformance” with the term “violation,” to ensure Rule 18 is consistent with the Commission’s determination that there is no difference between a nonconformance and a violation.

SED believes that the term “problem” might be more useful in Rule 18 than either “nonconformance” or “violation”; this topic should be considered if the rulemaking’s scope includes consideration of changes to Rule 18. The term “problem” could be defined as *“any condition or deterioration of an overhead facility that, if not repaired in a timely manner, may become a violation of the safety requirements.”*

A different possibility to consider would be use instead of the term “potential violation.” In D.16-09-055, the Commission adopted improvements and refinements to the gas and electric safety citation programs.¹⁴ In that decision, the Commission replaced the term “violations” with “potential violations” in provisions through which Staff may take into account voluntary reporting of such problems as a potential mitigating factor in deciding whether to issue a citation and, if so, the penalty. The Commission agreed with

¹² *Id.*, Section II.

¹³ D.04-04-065, 2004 Cal. PUC LEXIS 207 * 18.

¹⁴ D.16-09-055 2016 Cal. PUC LEXIS 522 at *1 (Cal. P.U.C. Sept. 29, 2016)

SED that, “the Commission, not the parties, determines what is in fact a violation.”¹⁵ Partly based on that finding, the Commission adopted “self-identified potential violations” as the appropriate term to use in the citation program.

Another option that could warrant consideration is to modify Rule 18 to address the actions that utilities and CIPs must take *to prevent* a violation from occurring, rather than the actions to take *after* a possible violation occurs and the utility or CIP discovers it. Rule 31.2 (general inspection requirements) in GO 95 requires utilities and CIPs to inspect their facilities “*frequently and thoroughly for the purpose of ensuring that they are in good condition so as to conform with these rules.*” The only way to ensure that electric and communication facilities comply with the requirements of GO 95 is for utilities and CIPs to adopt and implement preventive maintenance programs that identify problems before they become violations, and correct them.¹⁶

Of course, the appropriate terminology depends on how the rest of Rule 18 is structured. The term “problem” could be defined to include “potential violation” and/or both terms could be used. Regardless, SED emphasizes the importance of a clear statement that all violations are subject to potential enforcement action by Staff and/or the Commission.

3. Prioritization and timing of corrective actions

The PD proposes removal of the priority levels in Rule 18.A and the associated time periods that Rule 18.A currently allows for correcting nonconformances/ violations. The proposed Rule 18.A would still direct that corrective actions be prioritized based on a list of specified factors, “as appropriate.”

SED is concerned that, even with removal of the priority levels and associated time periods, this version of Rule 18.A could still be viewed as authorizing the entities to

¹⁵ D.16-09-055, FOF No. 15.

¹⁶ Rule 80.1 in GO 95 contains inspection requirements for communication facilities, and GO 165 contains inspection requirements for electric utilities’ distribution and transmission facilities. While these rules require that inspection records be kept, they do not require that problems identified through inspections be corrected.

determine which violations (if that term is used) can continue to exist, and for how long. GO 95 should prohibit violations, with all violations subject to potential enforcement action by Staff and/or the Commission. It should be clear that Staff may enforce GO 95 through issuance of Notices of Violation or citations (where authorized), for any violations that, in Staff's assessment, warrants such action.

In D.16-09-055, the Commission provided guidance to Staff regarding the factors that Staff should weigh in deciding whether to issue electric and gas citations (and, if so, in determining the amount of the penalty). If the Rule 18 rulemaking is scoped to consider possible changes to Rule 18, the scope should include (a) whether the prioritization of corrective actions in Rule 18.A should be retained; (b) if so, for what purpose; and (c) whether the list of factors in Rule 18.A should be modified to align more closely with some of the factors articulated in D.16-09-055.

4. Use of the term “safety hazard” and related notification requirements

It is unnecessary to use the term “safety hazard” in GO 95, Rule 18, and it is inappropriate to distinguish a safety hazard from a GO 95 violation. Any safety hazard is a violation (see GO 95 Rule 31.1¹⁷ and California Public Utilities Code § 451) and Rule 18 should not allow safety hazard violations to continue to exist. Further, the definition of “safety hazard” in Rule 18 dilutes the concept of a safety hazard by limiting it to conditions that pose an undefined “significant threat” to safety. GO 95 should prohibit all safety hazards, not just those that a utility or CIP determines to be “significant threats” to safety.

Rule 18.B requires that if a company, in inspecting its own facilities, discovers a safety hazard involving another company, the inspecting company notify the other company and/or facility owner of such safety hazard. Rule 18.B states that, “The notification shall be documented and such documentation must be preserved by all parties

¹⁷ Rule 31.1 states in part, “Electrical supply and communication systems shall be designed, constructed, and maintained for their intended use, regard being given to the conditions under which they are to be operated, to enable the furnishing of safe, proper, and adequate service.”

for at least ten years.” SED believes that Rule 18.B could help prevent violations from occurring if the term “safety hazard” is replaced by the term “problem.” As discussed above, the term “problem” could be defined to mean any condition or deterioration of an overhead facility that, if not repaired in a timely manner, may become a violation of the safety requirements. Another alternative could be to replace the term “safety hazard” with the term “potential violation.” These and perhaps other options could be considered if the scope of the new rulemaking is broadened to consider a range of possible modifications to Rule 18.

5. Documentation and notification of actions that result in GO violations or problems for another entity

Rule 18.A(1)(c) requires a single notice to other entities of GO nonconformances/violations created by a communications company’s or an electric utility’s own actions.

As written, Rule 18.A(1)(c) allows a known nonconformance/violation to continue to exist. SED’s position is that GO 95, just like other GOs, should not have any provisions that allow violations to exist. If a violation of GO 95 occurs, and if the Commission or its Staff has deemed that enforcement action is warranted for violating GO 95, the utility or CIP may be subject to daily fines as allowed by the Public Utilities Code (and D.16-09-055 for electric and gas utilities), until the violation is corrected. Each utility or CIP is responsible to ensure that its facilities comply with the requirements of GO 95, just as GO 128, and GO 112-F require.

Another concern with Rule 18.A(1)(c) is that, as written, a company could assert that sending a single notice absolves it of any other obligation if the other entities do not correct a violation after being notified of it. One example that comes to mind is the “buddy pole” problem that can exist after an electric utility replaces a jointly used pole and a communication company neglects to transfer its facilities to the new pole. If the new rulemaking is scoped to consider changes to Rule 18, it could consider whether Rule 18.A(1)(c) should be eliminated or modified in some way. As examples, addition of the documentation and record retention requirements in Rule 18.B could be helpful, as could

use of either term “problem” or “potential violation,” instead of “nonconformance” or “violation.”

III. CONCLUSION

In sum, the Commission should broaden the preliminary scoping memo because limiting the scope also limits the Commission's ability to receive evidence. The rulemaking should provide an opportunity for the Commission to consider evidence to weigh and ultimately conclude what modifications to Rule 18 are reasonable and necessary to ensure that the facilities covered by GO 95 remain safe. The scope of rulemakings has historically been broad because the nature of rulemaking proceedings generally has been broader than applications or investigations.

SED continues to maintain that the Commission should repeal Rule 18. SED respectfully requests that Commission expand the current scope of issues to allow SED to provide record evidence for the Commission to consider whether a repeal is justified. Broadening the scope of the preliminary scoping memo to include this issue does not mean the PD agrees with repealing Rule 18, but rather it gives SED and parties the opportunity to submit factual evidence and rebuttal evidence for the Commission to decide whether a repeal is necessary.

If the rulemaking considers whether to amend or modify Rule 18, the scope of this consideration should be written broadly, to include more than the four issues identified in the PD. The preliminary scoping memo in the PD would prevent the Commission from considering anything beyond those four issues. There may be alternative ways to better amend Rule 18. Without a broad scope, the Commission would not be able to receive information necessary for it to make findings on issues that may not have been identified fully regarding how to ensure that Rule 18 (or its repeal) enhances and promotes safety.

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Respectfully submitted,

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Appendix A

Proposed Changes to Conclusions of Law

1. It is in the public interest to institute a rulemaking proceeding to consider the following issues regarding amendments to Rule 18 of GO 95:

- i. Amendments to e~~E~~liminate the provisions in Rule 18 that allow utilities to defer or forgo the remediation of overhead facilities that pose a risk to safety and/or reliability.
- ii. Amendments to r~~R~~eplace the term “nonconformance” in Rule 18 with the term “violation.” or some other term.
- iii. Correction of non-substantive typographical errors in Rule 18.
- iv. Ancillary amendments to Rule 18, other rules in GO 95, and other general orders, as appropriate, to reflect ~~the previous~~ proposed amendments to Rule 18.
- v. Addition of a statement that Rule 18 does not relieve companies from any requirements elsewhere in GO 95, and that all violations of GO 95’s safety requirements are subject to potential enforcement actions, regardless of whether the electric utility or Communication Infrastructure Provider has plans for corrective action.
- vi. Whether the prioritization of corrective actions in Rule 18.A should be retained; if so, for what purpose; and whether the list of factors in Rule 18.A should be modified to align more closely with the citation factors articulated in Decision 16-09-055.
- vii. Any other amendments to Rule 18 that would enhance the safety and reliability of facilities subject to GO 95.
- viii. Whether Rule 18 should be repealed and, if so, whether any of its provisions should be moved elsewhere in GO 95.

Proposed Changes to ORDER

1. A rulemaking proceeding is instituted to consider the following issues regarding amendments to Rule 18 of GO 95:

- i. Amendments to eEliminate the provisions in Rule 18 that allow utilities to defer or forgo the remediation of overhead facilities that pose a risk to safety and/or reliability.
- ii. Amendments to rReplace the term “nonconformance” in Rule 18 with the term “violation.” or some other term.
- iii. Correction of non-substantive typographical errors in Rule 18.
- iv. Ancillary amendments to Rule 18, other rules in GO 95, and other general orders, as appropriate, to reflect ~~the previous~~ proposed amendments to Rule 18.
- v. Addition of a statement that Rule 18 does not relieve companies from any requirements elsewhere in GO 95, and that all violations of GO 95’s safety requirements are subject to potential enforcement actions, regardless of whether the electric utility or Communication Infrastructure Provider has plans for corrective action.
- vi. Whether the prioritization of corrective actions in Rule 18.A should be retained; if so, for what purpose; and whether the list of factors in Rule 18.A should be modified to align more closely with the citation factors articulated in Decision 16-09-055.
- vii. Any other amendments to Rule 18 that would enhance the safety and reliability of facilities subject to GO 95.
- viii. Whether Rule 18 should be repealed and, if so, whether any of its provisions should be moved elsewhere in GO 95.